COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.00 PER ANNUM. 30 CENTS PER NUMBER.

It is with a sense of irreparable loss that we record that former JUDGE WILLIAM A. KEENER, yielding to the demands of his practice, has retired from his professorship in the Columbia Law School. It was largely his interest and the inspiration and spirit of his teaching that made this REVIEW possible. It will be our earnest endeavor to perpetuate that spirit in these pages.

We take pleasure in welcoming to the School, as members of the teaching staff, JAMES B. SCOTT, FRANCIS C. HUNTINGTON AND JACKSON E. REYNOLDS.

HERMAN FOSTER ROBINSON, a graduate of the Columbia Law School, of the Class of 1901, died June 21, 1903. He was one of the founders of the REVIEW, and his energy, enthusiasm and executive ability were essential factors in its progress during its early career. The editors, past and present, feel deeply his loss as that of an able advisor and sincere friend.

NOTES.

RIGHT OF ACTION FOR THE MALICIOUS PROSECUTION OF A CIVIL SUIT.—A decision which has stood since 1828, and often been cited in other jurisdictions as New York law, has recently been disapproved. In *Pangburn* v. *Bull* (1828), 1 Wend. 345, the Supreme Court held that the defendant in an ordinary civil suit, prosecuted maliciously and without probable cause, could maintain an action for such malicious prosecution, even though, in the original action, there had been no interference with the defendant's person or property by arrest, attachment or other provisional remedy. That some such in-

terference with person or property is necessary, is now announced by the Appellate Division, Fourth Department. *Paul* v. *Fargo* (1903) 82 N. Y. Supp. 369. ADAMS, P. J., dissenting.

On this question the authorities are in irreconcilable conflict. In twelve States the decisions are in harmony with *Pangburn* v. *Bull*, *supra*, while twelve others are in accord with the principal case. The latter is the English view. *Quartz Hill Co.* v. *Eyre* (1883) L. R. 11 Q. B. D. 674. The reason given in England for denying the defendant's action is that, in the eye of the law, the costs awarded him are compensation for having to defend a groundless prosecution. The American Courts which have adopted the English rule, and with it the English reason, have failed to notice that the fact which makes the reason a sound one in England does not exist in this country. That fact is that the English costs are intended to compensate the defendant, and seem to have been established by statute in lieu of remedies formerly available to him. In the early law a plaintiff who "unjustly vexed" a defendant with litigation was fined and imprisoned, and in certain circumstances the defendant could recover damages. Every early plaintiff, too, was required to "find pledges" who if his cause proved false, were amerced to the King. Apparently for the purpose of giving a more effective remedy, the system of giving costs to the successful party was introduced by the Statute of Marlbridge. Law Mag. and Rev. 4th Series, vol. 1, p. 670. The costs as awarded in England include the attorneys' charges, the fees of the witnesses and court officials, and even the *honorarium* of the barrister who conducts the case in Court. 21 Am. Law Reg. 370. Though the malicious prosecution was recognized as a wrong it was only when the defendant sustained some damage beyond the ordinary expense of defending the suit, as, for example, where he was subjected to arrest and his property to attachment, that the remedy of costs was insufficient and it was necessary to allow a counter suit. *Webster* v. *Haigh* (1685) 3 Lev. 210; *Johnson* v. *Emmerson*, Selwyn, N. P., 1026; *Saville* v. *Roberts* (1697) 1 Salk, 14. On the other hand the American statutes allowing costs have been enacted with reference to suits brought and prosecuted in good faith. To claim that the payment of the mere court fees will make amends for the wrong done by a malicious prosecution is palpably false. The defendant has given his time to defending the suit. He has employed counsel and perhaps incurred travelling expenses. In many actions, as in the principal case, where the defendant was sued for the conversion of a package of bank-bills, there is injury to his reputation. In such cases the fact that the plaintiff has been made to pay the costs is no recompense to the defendant, who has, because of the malicious proceeding on the part of the plaintiff, suffered real damage. This lack of adequate remedy in costs makes it necessary, if the principles of the common law are to be applied, to give the action a broader scope in the United States than it is necessary to give to it in England—a scope denied it in the principal case.

As to policy, neither of the considerations advanced by the principal case seem entitled to much weight. Surely, it cannot be seriously contended that in the seventy-five years that *Pangburn* v. *Bull* has stood in New York, plaintiffs have been unduly discouraged from

bringing actions by fear of counter-suits. As for the other argument, that defendants would be unduly encouraged to bring counter-suits, there is the same short answer that such has not been the result in the past. Further, the argument works both ways. Granting that to allow defendants to maintain actions and recover damages is to encourage them to come into court, surely, to deny the action is to invite litigation of the worst kind—litigation by plaintiffs whose sole object in a large number of cases is to vex the defendant with a law suit. For a collection of the authorities see *Kolka* v. *Jones* (1897) 6 N. D. 461; 21 Am. Law Reg. 281, 353; 2 COLUMBIA LAW REVIEW 124.

THE LATEST INSULAR CASE.—After the annexation of Hawaii one Mankichi was convicted of manslaughter by a criminal procedure other than that described by Amendments V. and VI. If the guarantees afforded by these Amendments apply of their own force to all territory that comes within our sovereignty, the conviction was illegal. Do these Amendments, the others forming the so-called "Bill of Rights," and the other limitations of the Constitution have this inherent force or do they apply merely to the States and to such territory as they have been extended to by treaty or legislation? At the time of the Dred Scott decision it was generally accepted that these limitations were everywhere inherently applicable. Yet, in the Insular case of *Downes* v. *Bidwell* (1900) 182 U. S. 244, BROWN, J., argued that they applied of their own force only within the States, and four other justices, adopting a novel and anomalous doctrine of "incorporation into the Union," concurred in the decision that the limitation as to uniformity of taxation does not necessarily apply to territory merely because it comes within our sovereignty. 1 COLUMBIA LAW REVIEW 436. In upholding the conviction of Mankichi the Supreme Court has reached the same result as to Amendments V. and VI. *Hawaii* v. *Mankichi* (1903) 190 U. S. 197. In the light of these cases it cannot be said with certainty that any of the limitations apply of their own force to our new possessions except those of Amendments I. and XIII. and Art. I., Sect. 9, §§ 3, 8. Radically different as is this interpretation from that of the Dred Scott decision, neither does actual violence to the phrasing of the Constitution. Remembering this fact and the radically different conditions under which the question arose in 1856 and 1900, it is not surprising that such opposite results should have been reached.

Three sets of considerations operated to make the earlier doctrine reasonable and acceptable to its generation. There were circumstances peculiar to the territory we held at that time. The Louisiana Purchase, Florida, the Mexican Cession, were acquired under treaties promising the guaranties of the Constitution. Good faith demanded that they be accorded and, indeed, Marshall, in the case of Florida, held that the treaty itself operated as legislation to confer them. *American Ins. Co.* v. *Canter* (1826) 1 Peters 511. The District of Columbia had been part of States. Then again, in the slavery dispute both sides sought to make use of the application of Amendment V. to the Territories. Finally, there was the feeling that, from the